

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 03-13878-MWV
Chapter 11

Bob Desmond,
Debtor

Bob Desmond,
Plaintiff

v.
ASR Acquisition Corp.,
Defendant

Adv. No. 04-1107-MWV

Robert Wolfe Associates, P.C.,
Plaintiff

v.
Bob Desmond,
ASR Acquisition Corp., and
Alfred Ross,
Defendants

Adv. No. 04-1112-MWV

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MEMORANDUM OPINION

The Court has before it a motion filed by Bob Desmond (the “Debtor”) and Robert Wolfe Associates, P.C. (“Wolfe”), seeking to consolidate adversary proceeding 04-1107-MWV (the “Desmond adversary”) with adversary proceeding 04-1112-MWV (the “Wolfe adversary”) pursuant to Rule 42(a) of the Federal Rules of Civil Procedure. ASR Acquisition Corp. (“ASR”) filed its opposition to the motion

on September 7, 2004. The Court held a hearing on this matter on December 2, 2004, and took it under advisement. For the reasons set out below, the motion filed by the Debtor and Wolfe (collectively, the “Movants”) is denied.

JURISDICTION

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

DISCUSSION

Rule 42(a) of the Federal Rules of Civil Procedure, made applicable to these proceedings by Rule 7042 of the Federal Rules of Bankruptcy Procedure, gives courts the discretion to consolidate separate actions presenting a common issue of law or fact. The district court is given broad discretion to decide whether consolidation is proper. See Yapp v. Excel Corp. 186 F.3d 1222 (10th Cir. 1999); In re Cannonsburg Env'tl. Assoc. Ltd., 72 F.3d 1260 (6th Cir. 1996).

On a motion to consolidate, the moving party has the burden of persuading the court that consolidation is desirable, Solvent Chem. Co. v. E.I. Dupont De Nemours & Co., 242 F.Supp 2d 196, 221 (W.D.N.Y. 2002), but the Movants in the instant case fail to satisfy the burden. The Movants argue that both proceedings involve common questions of law and fact as both proceedings will require this Court to determine, among other things, how much money Desmond owes ASR on account of the loans purchased by ASR for Desmond. The Court does not agree. The determination of ASR's claims and the nature and extent of the liens is only part of the multiple claims of both proceedings. The central issue of the Wolfe adversary is the allegation that Wolfe was defrauded by the representations made by the Debtor and ASR. Thus, to prevail on its claims, Wolfe must prove fraud from the side of the Debtor and ASR. On the other

hand, in the Desmond proceeding, the Debtor need not prove fraudulent conduct by ASR since the only count which is required to prove ASR's fraud, equitable subordination, has been dismissed by the Court's recently issued opinion. See Ct. Doc. 76 in the Desmond adversary.

Further, although the consolidation may be convenient for the Movants, it may create confusion by combining already complicated claims. The Court also notes that neither adversary proceeding shares both the same plaintiff or defendant. For instance, the Debtor is one of three defendants in the Wolfe adversary whereas he is a plaintiff in the Desmond adversary. Moreover, consolidation is unfair and prejudicial to Alfred Ross, who is a defendant in the Wolfe adversary, but not a party in the Desmond adversary. Alfred Ross could be prejudiced if evidence against ASR is introduced to a level that may deprive him of a fair opportunity to a defense. See In re Consol. Parlodel Litig., 182 F.R.D. 441 (D.N.J. 1998) (denying consolidation because the potential for prejudice outweighed considerations of judicial economy). Therefore, the Court determines that consolidation of both adversary proceedings is not appropriate under Rule 42(a) because only one question was common to both cases, and the actions arose under different legal theories with different defendants, different plaintiffs, and the potential for confusion or prejudice outweighs efficiency gains.

CONCLUSION

For the reasons outlined above, the motion to consolidate is denied. This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 20th day of September, 2005, at Manchester, New Hampshire.

/s/ Mark W. Vaughn
Mark W. Vaughn
Chief Judge